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Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

STATE OF ARKANSAS ..... *Petitioner*

vs.

NORMA FOSTER ..... *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE ARKANSAS SUPREME COURT

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QUESTIONS PRESENTED

I.

WHETHER THE FORMER JEOPARDY PRINCIPLES SET FORTH IN *BURKS V. UNITED STATES*, 437 U.S. 1 (1978) AND *GREENE V. MASSEY*, 437 U.S. 19 (1978) REQUIRE DISMISSAL WHEN THE ARKANSAS SUPREME COURT REVERSES A CRIMINAL CONVICTION DUE TO THE FAILURE OF THE STATE TO CORROBORATE ACCOMPLICE TESTIMONY PURSUANT TO ARK. STAT. ANN. §43-2116 (REPL. 1977).

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IN THE

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OCTOBER TERM, 1986

No. _____

STATE OF ARKANSAS ..... *Petitioner*

vs.

NORMA FOSTER ..... *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE ARKANSAS SUPREME COURT

The State of Arkansas, the petitioner herein, petitions for a writ of certiorari to review the judgment of the Arkansas Supreme Court in this case.

OPINIONS BELOW

The opinion of the Arkansas Supreme Court is reported as *Foster* v. *State*, 290 Ark. 495, 720 S.W.2d 712 (1986), *reh. denied*, 290 Ark. 498-A, 722 S.W.2d 869 (1987), and is reprinted in the appendix attached hereto.

JURISDICTION

The judgment of the Arkansas Supreme Court was entered on December 15, 1986. Petitioner the State of Arkansas' petition for rehearing was denied by the Arkansas Supreme Court on February 9, 1987. On March 20, 1987, Justice Blackmun granted an extension of time until April 24, 1987, for petitioner to file a petition for writ of certiorari. This Court has jurisdiction to review this case pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb; . . . ."

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> "[N]or shall any state deprive any person of life, liberty, or property, without due process of law; . . . ."

STATEMENT OF CASE

A. *FACTS OF THE CASE.*

On April 22, 1986, a Clark County, Arkansas, jury found Norma Foster guilty of first degree murder. The jury found that Foster had assisted her friend, Patricia Hendrickson, in the hiring of Howard Vagi to murder Hendrickson's husband, Orin Hendrickson. Vagi did, in fact, murder Orin Hendrickson for a payment of $16,000. At trial, most of the State's evidence consisted of the testimony of Foster's accomplice, Vagi, the hired killer. Vagi had earlier pleaded guilty and had agreed to testify for the State against Foster. The April 22, 1986, trial was Foster's third trial for the murder of Orin Hendrickson. The circumstances of the earlier proceedings against Foster have no bearing on the issue presented in the instant petition.

B. *PRESENTATION OF THE FEDERAL QUESTION.*

At trial, after the State had presented its case and again at the close of her own case, Foster moved for a directed verdict. The core of Foster's motion was her allegation that the State had failed to corroborate its accomplice testimony. In Arkansas, the prosecution must corroborate accomplice testimony to obtain a felony conviction. *See* Ark. Stat. Ann. § 43-2116 (Repl. 1977). The trial court denied Foster's directed verdict motions. The jury convicted Foster, on an accomplice liability theory, of the first degree murder of Orin Hendrickson.

On direct appeal, the Arkansas Supreme Court reversed and dismissed Foster's conviction. The Arkansas Supreme Court did so because, according to its estimate of the State's case, the State had failed to corroborate the testimony against Foster. The State petitioned for rehearing on the ground that its failure to corroborate its accomplice testi-

mony did not require, as a matter of the former jeopardy principles embodied in the Due Process Clause of the Fourteenth Amendment [incorporating the former jeopardy clause of the Fifth Amendment — *see Benton* v. *Maryland*, 395 U.S. 784 (1969)], that Foster's conviction be dismissed; in its petition for rehearing the State argued that Foster's conviction should be remanded for a new trial, not dismissed. In denying the State's petition for rehearing, the Arkansas Supreme Court relied expressly on its prior case of *Pollard* v. *State*, 264 Ark. 753, 574 S.W.2d 656 (1978). In *Pollard*, the Arkansas Supreme Court had interpreted *Burks* v. *United States*, 437 U.S. 1 (1978) and *Greene* v. *Massey*, 437 U.S. 19 (1978) to require dismissal as a matter of a defendant's Fourteenth Amendment right to due process of law when it reverses a felony conviction for failure to corroborate accomplice testimony, pursuant to Ark. Stat. Ann. § 43-2116. The Arkansas Supreme Court's explicit reliance on its own interpretation in *Pollard* of *Burks* and *Greene* to dismiss Foster's conviction is, essentially, a recognition of a Fourteenth Amendment right held by Foster and is also an assertion that this due process right is superior to Arkansas' Tenth Amendment right, as sovereign, to try and to punish criminal defendants such as Foster for crimes committed within the state. The Arkansas Supreme Court's elevation of Foster's Fourteenth Amendment due process right over Arkansas' Tenth Amendment right presents the federal question that is necessary in order for this Court to exercise its statutory jurisdiction by means of writ of certiorari.

ARGUMENT

I.

THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE FORMER JEOPARDY CLAUSE OF THE FOURTEENTH AND FIFTH AMENDMENTS DOES NOT REQUIRE DISMISSAL WHEN A STATE APPELLATE COURT REVERSES A CRIMINAL CONVICTION BECAUSE THE PROSECUTION FAILED TO CORROBORATE ITS ACCOMPLICE TESTIMONY.

In *Foster* v. *Arkansas*, 290 Ark. 495, 720 S.W.2d 712 (1986), *reh. denied*, 290 Ark. 498-A, 722 S.W.2d 869 (1987), the Arkansas Supreme Court held that *Burks* v. *United States*, 437 U.S. 1 (1978) and *Greene* v. *Massey*, 437 U.S. 19 (1978), require dismissal if the prosecution fails to corroborate its accomplice testimony. As a matter of state statute, in Arkansas the prosecution cannot obtain a felony conviction unless it corroborates the accomplice testimony that it presents against the defendant. *See* Ark. Stat. Ann. § 43-2116 (Repl. 1977). The Arkansas Supreme Court's use of *Burks* and *Greene* as authority to require dismissal for the State's failure to corroborate its accomplice testimony mangles the constitutional principles that *Burks* and *Greene* stand for. Petitioner respectfully submits that this Court should correct the Arkansas Supreme Court's misstatement and misapplication of the former jeopardy principles that this Court has set forth in *Burks* and *Greene*. The exact point at which the Arkansas Supreme Court falls into error in its application of the Due Process Clause of the Fourteenth Amendment as interpreted in *Burks* and *Greene* is its failure to correctly characterize "failure to corroborate accomplice testimony" as a "trial error," as this category is explicated in *Burks*.

Of the two cases, *Burks* is the leading case.[1] *Burks* holds that an appellate court's decision that the State's evidence was insufficient to support the appellant's conviction is the equivalent, for former jeopardy purposes, of a jury's verdict of acquittal. When an appellate court holds that the State's evidence was insufficient, it holds that the State failed to prove the appellant's guilt beyond a reasonable doubt. *See Burks, supra* at 16 n.10.

For the instant decision to fall within the reach of the *Burks* rule, Foster's conviction *must* have been reversed for insufficiency of the evidence such that the prosecution failed to prove her guilt beyond a reasonable doubt. However, Foster's conviction *could not* have been reversed because of the State's failure to prove its case beyond a reasonable doubt if her conviction was reversed for failure to corroborate accomplice testimony. This is so because the accomplice corroboration rule is not required by the reasonable doubt standard. Juries may, consistent with the reasonbale doubt standard, convict on the *uncorroborated* testimony of an accomplice. *See Krulewitch* v. *United States*, 336 U.S. 440, 454 (1949) (Jackson, J., concurring opinion); *Caminetti* v. *United States*, 242 U.S. 470, 495 (1917); *see also Takacs* v. *Engle*, 768 F.2d 122, 127 (6th Cir. 1985); and *Lyles* v. *United States*, 249 F.2d 744 (5th Cir. 1957), *cert. denied*, 356 U.S. 931 (1958). The failure of the State to corroborate accomplice testimony is not cognizable in federal habeas corpus review as a violation of the defendant/petitioner's constitutional right to due process of law. *Gipson* v. *Lockhart*, 692 F.2d 66, 68 (8th Cir. 1982); *see also Murphy* v. *Sowders*, 801 F.2d 205, 208-12 (6th Cir. 1986), *cert. denied*, 40 Crim.L.Rptr. 4210 (1987) (a state may repeal its accomplice

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[1]Neither *Burks* nor *Greene* involved the prosecution's failure to corroborate its accomplice testimony. *Greene* merely applies the *Burks* holding to the states *via* the due process incorporation doctrine. *See Benton* v. *Maryland*, 395 U.S. 784 (1969) (the Fifth Amendment's former jeopardy provision is fully applicable to the states).

testimony corroboration statute and apply the repeal retroactively). In addition, Arkansas' accomplice corroboration statute does not require corroboration of accomplice testimony for the prosecution to obtain a misdemeanor conviction, yet the reasonable doubt standard *does* apply in misdemeanor cases. *See In re Winship*, 397 U.S. 358 (1970). Therefore, even as a matter of Arkansas' accomplice corroboration statute, uncorroborated accomplice testimony does meet the reasonable doubt standard of the Fourteenth Amendment.

Moreover, whether a court has acquitted a defendant such that former jeopardy prevents a subsequent retrial of the defendant depends upon whether the court's ruling represents a resolution of some or all of the factual elements of the offense charged. *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977). The requirement that the State's accomplice testimony be corroborated is not an element of first degree murder in Arkansas, the crime that Foster committed. *See* Ark. Stat. Ann. § 41-1502 (Repl. 1977). Indeed, such a requirement could not be a valid element of any crime because, in Arkansas, evidence corroborating accomplice testimony need not meet the due process requirement of proof beyond a reasonable doubt. *See Olles* v. *State*, 260 Ark. 571, 573, 542 S.W.2d 755, 757-58 (1976). Evidence corroborating accomplice testimony is sufficient if it merely independently establishes the crime and tends to connect the defendant with its commission. *Hallman* v. *State*, 288 Ark. 448, 452, 706 S.W.2d 381, 383 (1986).

Rather than being a failure of the State's proof, failure to corroborate accomplice testimony is more properly classified, pursuant to *Burks*, as trial error. According to *Burks*, trial error is a fundamental defect in the trial process, such as the incorrect receipt of evidence. *Burks*, *supra* at 15. Arkansas' accomplice testimony rule is, in essence, a rule of evidence governing the weight that the jury is to accord accomplice testimony that has been admitted into evidence. The accomplice corroboration statute applies only to one part of the

State's case, its accomplice testimony. Of the State's accomplice testimony, only its material part need be corroborated. *Orsini* v. *State*, 281 Ark. 348, 355, 665 S.W.2d 245, 250, *cert. denied*, 469 U.S. 847 (1984) and *Olles* v. *State*, 260 Ark. 571, 576, 542 S.W.2d 755, 759, (1976). As *Orsini* and *Olles* suggest, corroboration of the material aspects of an accomplice's testimony confirms all his testimony and thereby allows the jury to accord it whatever weight the jury chooses. *See Butt* v. *State*, 81 Ark. 173, 184, 98 S.W. 723, 727 (1906) (weight of corroborated accomplice testimony is for the jury) and *Kent* v. *State*, 64 Ark. 247, 253, 41 S.W. 849, 852 (1897). On the other hand, if the jury finds that the accomplice testimony is not corroborated in its material aspects, then the accomplice testimony corroboration statute bars the jury from attaching any weight *whatsoever* to the accomplice testimony. Once the jury determines the weight, if any, the accomplice's testimony is entitled to, it then determines whether the State proved its case beyond a reasonable doubt. Both the sufficiency of the accomplice corroboration and the sufficiency of the State's entire case are for the jury to determine. *Gardner* v. *State*, 263 Ark. 739, 749, 569 S.W.2d 74, 79 (1978), *cert. denied*, 440 U.S. 911 (1979). The jury could find corroboration and thereby give some weight to accomplice testimony, but also find that the State's *entire* case was insufficient to prove the defendant's guilt beyond a reasonable doubt. Such a finding is possible because corroboration of the accomplice testimony need not be sufficient to sustain a conviction. *See Olles* v. *State*, 260 Ark. 571, 573, 542 S.W.2d 755, 757-58 (1976).

This possible finding of corroboration, yet no proof beyond a reasonable doubt, proves that the accomplice testimony rule guarantees, at most, that the jury will be able to attach whatever weight to accomplice testimony it chooses to bestow. The accomplice testimony statute does not guarantee that the jury will find the corroborated accomplice testimony especially credible, *only* that the jury will have the opportunity to find the corroborated accomplice testimony at least

minimally credible — even with corroborated accomplice testimony, the State still must prove every element of the crime charged beyond a reasonable doubt. Of course, the accomplice testimony rule also guarantees that the jury will not attach any weight at all to accomplice testimony if the jury does not find any corroborating evidence. When the Arkansas Supreme Court reverses for failure to corroborate accomplice testimony it holds, in effect, that the defendant's conviction was improper because the jury erred in attaching any weight at all to uncorroborated accomplice testimony because, for that part of the State's case, there was no minimal guarantee of the accomplice's trustworthiness. Such a holding is not necessarily a statement that *all* of the State's evidence failed to prove the defendant's guilt beyond a reasonable doubt, but only a statement that the jury erred in attaching any weight at all to that part of the State's proof that consisted of accomplice testimony. *See Griffin* v. *State*, 172 Ark. 606, 289 S.W. 765 (1927). Appellate reversals based on the jury's erroneous assessment of the weight of the State's evidence, as opposed to the *sufficiency* of the State's evidence, do not erect a Fourteenth Amendment former jeopardy bar to subsequent retrial of the defendant. *See Tibbs* v. *Florida*, 457 U.S. 31 (1982).

In summary, the Arkansas Supreme Court held in *Foster* v. *State*, 290 Ark. 495, 720 S.W.2d 712 (1986), *reh. denied*, 290 Ark. 498-A, 722 S.W.2d 869 (1987), that the former jeopardy clause of the Fourteenth and Fifth Amendments, as interpreted by this Court in *Burks* v. *United States*, 437 U.S. 1 (1978), erects a former jeopardy bar to the subsequent prosecution of a criminal defendant in a felony case if it reverses the defendant's criminal conviction on direct appeal because of the State's failure to corroborate its accomplice testimony. This holding by the Arkansas Supreme Court misstates constitutional law as set forth by this Court in *Burks*. The Arkansas Supreme Court's holding in *Foster* misstates the law of former jeopardy in that *Foster* holds that appellate reversal of a defendant's

conviction because of the State's failure to corroborate accomplice testimony raises a Fourteenth and Fifth Amendment former jeopardy bar to any subsequent reprosecution of the defendant. The former jeopardy clause has never been so interpreted by this Court. In fact, appellate reversals based on the failure of the State to corroborate its accomplice testimony are reversals based on the jury's erroneous assessment of the *weight* of the State's case. Such reversals are "trial error," as that term is defined in *Burks. See Tibbs, supra.*

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Norma FOSTER *v.* STATE of Arkansas

CR 86-139

Supreme Court of Arkansas
Opinion delivered December 15, 1986

Appeal from Clark Circuit Court; *J. Hugh Lookadoo,* Judge; reversed and dismissed.

James C. Cole, for appellant.

Steve Clark, Att'y Gen., by: *J. Blake Hendrix,* Asst. Att'y Gen., for appellee.

JOHN I. PURTLE, Justice. The appellant was convicted of murder in the first degree at her third trial. Her first trial resulted in a conviction which we reversed and remanded for a new trial. See *Foster* v. *State,* 285 Ark. 363, 687 S.W.2d 829 (1985). A mistrial was declared in the second trial. The appellant makes many arguments on appeal, but we reach only the argument that there was no corroboration of the accomplices' testimony. We do not find any evidence in the record to corroborate the accomplices' testimony as required for a conviction under the law; therefore, we must reverse her conviction and dismiss this case.

The appellant was charged as an accomplice of Patricia Hendrickson, and others, in the murder of Orin Hendrickson, the husband of Patricia Hendrickson. The conviction of Patricia Hendrickson for capital murder has recently been affirmed by this Court. See *Hendrickson* v. *State,* 290 Ark. 319, ___ S.W.2d ___ (1986).

Since we base our decision on the fact that there was no corroboration of the testimony of Mark Yarbrough or Howard Vagi, both accomplices, we find it unnecessary to recite all the facts. Instead, we have searched the record for testimony and/or

other evidence, other than the testimony of Yarbrough and Vagi, which might tend to connect the appellant to the murder. Howard Vagi, now serving time for the murder of Orin Hendrickson, testified at the third trial. However, after a careful study of his testimony we conclude that he gave no testimony which tended to indicate guilty knowledge on the part of Norma Foster. The other accomplice, Mark Yarbrough, although not charged with any crime, testified at length and did implicate the appellant. It is corroborating evidence of this testimony for which we have searched the record in vain.

We have searched the entire record and find only two incidents which could be considered in any manner corroborative of the accomplices' testimony. The first event which the state argues corroborates the accomplices' testimony is that the appellant called Patricia Hendrickson's employer, Mr. Roberson, from the scene of the murder after discovery of the body. The appellant had gone home with her friend, Pat Hendrickson, when the body was discovered by them. Several phone calls, including calls to the police and sheriff departments, were made before the one to Roberson. Roberson testified Foster stated, "Get out here quick, Orin's been shot." It would have been unusual for the appellant not to have realized that the victim had been shot. The photographs introduced into evidence show clearly the general nature and extent of the wounds. The pictures also show that buckshot had struck the refrigerator and the area nearby. This statement to Hendrickson's employer is in no way incriminating, and there is nothing in the record which tends to prove that the statement had any independent meaning which reflected any prior knowledge by the appellant of the murder.

The other possible corroborating evidence is the fact that Vagi's motorcycle was seen parked at the appellant's residence some eight months after the murder. Both Yarbrough and Vagi testified that the appellant had no knowledge that the

motorcycle had been used to aid in the murder. In fact, it seems undisputed that the cycle was parked there with her permission because there was no place to park it on the university campus. The parking of a motorcycle does not tend to connect the appellant with the murder. Other than the accomplices' testimony there is no evidence that the vehicle was in any manner connected with the crime in this case.

We have examined the testimony of all other witnesses, including the medical examiner, and find no corroborating evidence of the accomplices' testimony. No witness, other than Vagi, was present at the murder. Nor has any witness testified that the appellant, any other alleged accomplice or the motorcycle was seen at or near the scene of the crime.

Even if we consider the record in her first conviction, stripped of inadmissible evidence, we cannot find evidence, direct or circumstantial, which tends to connect the appellant to the crime. This rule of law is not new and it is not judge-made law. The statute upon which we base this decision has remained essentially in its present form since 1883. Ark. Stat. Ann. § 43-2116 (Repl. 1977) states:

> 43-2116. Testimony of accomplice. — A conviction cannot be had in any case of felony upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows that the offense was committed, and the circumstances thereof. Provided, [t]hat in misdemeanor cases a conviction may be had upon the testimony of an accomplice.

We have construed this statute many times, and we have held that the testimony of an accomplice standing alone is insufficient to support a conviction. See *Bly* v. *State*, 267 Ark.

612, 593 S.W.2d 450 (1980); and *Gardner* v. *State*, 263 Ark. 739, 569 S.W.2d 74 (1978), cert. den. 440 U.S. 911 (1979). Testimony of an accomplice is insufficient to justify conviction of a felony, even though the court and jury believed his testimony. *Griffin* v. *State*, 172 Ark. 606, 289 S.W. 765 (1927). The test for determining the sufficiency of corroborating evidence is whether, if the testimony of the accomplice were totally eliminated from the case, the other evidence independently establishes the crime and tends to connect the accused with its commission. *Henderson* v. *State*, 279 Ark. 435, 652 S.W.2d 16 (1983). See also *Burnett* v. *State*, 262 Ark. 235, 556 S.W.2d 653 (1977), cert. den. 435 U.S. 944 (1978); and *Olles* v. *State*, 260 Ark. 571, 542 S.W.2d 755 (1976).

There are very good reasons for requiring corroboration of accomplice testimony. The justification can readily be seen in a case such as this one. Mark Yarbrough admittedly participated in planning and executing the murder. He testified that the appellant was an accomplice. However, he was told by the prosecuting attorney that he would not be charged with any crime if he testified. In testifying against the appellant, he was keeping his promise to the prosecutor. Therefore, it becomes obvious why corroboration of accomplice testimony is essential.

The rule requiring corroboration is not in existence to protect the guilty nor is the statute to be applied only in specific cases. The reason for the rule is that the instinct for survival renders the testimony of an accomplice less than completely credible. The central idea of the rule is to prevent a person from being convicted solely upon false testimony. To allow a conviction to stand based solely upon the testimony of an accomplice would likely result in the conviction of innocent people.

We have searched the entire record and have found

nothing to support the accomplices' testimony; therefore, we reverse the conviction and dismiss the charge in this case.

Reversed and dismissed.

Supplemental Opinion on Denial of Rehearing
February 9, 1987

PER CURIAM. The appellee complains that we should remand this case rather than dismiss it. It is argued that we misinterpreted two United States Supreme Court decisions when, in *Pollard* v. *State*, 264 Ark. 753, 574 S.W.2d 656 (1978), we held we were required to dismiss when we found the state's evidence insufficient due to lack of corroboration of an accomplice.

The appellee says that neither *Burks* v. *United States*, 437 U.S. 1 (1978), nor *Greene* v. *Massey*, 437 U.S. 19 (1978), was a case in which the insufficiency of the evidence resulted from failure to corroborate an accomplice's testimony. *Greene* v. *Massey*, *supra*, applied to the states the holding of *Burks* v. *United States*, *supra*, that it would be double jeopardy to try an accused again after having failed to produce sufficient evidence at the first trial. The appellee argues that the rule of those cases applies only when the state has failed to produce sufficient evidence to permit the jury to find guilt beyond a reasonable doubt. The extension of that argument is that the rule does not apply when the evidence of guilt is sufficient to pass a constitutional challenge but fails only because of a statutory requirement such as that found in Ark. Stat. Ann. § 43-2116 (1977) requiring corroboration of the testimony of an accomplice.

We might agree with the appellee's technical basis for saying the Supreme Court cases could be limited to their facts. However, that would ignore the reasoning expressed in *Burks*

v. *United States, supra.* There the prosecution had failed to produce sufficient evidence of the sanity of the accused as it was required to do after insanity had been raised as a defense. The court of appeals reversed on that basis and remanded for a new trial. The Supreme Court reversed on the traditional distinction between error at trial which permits retrial and failure of the prosecution's evidence which requires dismissal. Writing for a unanimous Supreme Court (Mr. Justice Blackmun not participating) Mr. Chief Justice Burger pointed out that when reversal comes about through error, ". . . the accused has a strong interest in obtaining a fair readjudication of his guilt free from error, just as society maintains a valid concern for insuring that the guilty are punished." 437 U.S. at 15. He continued:

> The same cannot be said when a defendant's conviction has been overturned due to a failure of proof at trial, in which case the prosecution cannot complain of prejudice, for it has been given one fair opportunity to offer whatever proof it could assemble. Moreover, such an appellate reversal means that the government's case was so lacking that it should not have even been *submitted* to the jury. Since we necessarily afford absolute finality to a jury's *verdict* of acquittal — no matter how erroneous its decision — it is difficult to conceive how society has any greater interest in retrying a defendant when, on review, it is decided as a matter of law that the jury could not properly have returned a verdict of guilty. [437 U.S. at 16, footnote omitted]

Thus it is clear to us that if the United States Supreme Court were reviewing the case before us now it would hold, as we now hold, that if under our law an accused must be acquitted if the state's case is based on the uncorroborated testimony of an accomplice, then that determination on appeal prohibits retrial just as it does when acquittal occurs at the

trial. The reason for reversal is not "error" but insufficiency of the state's proof.

> The Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding. This is central to the objective of the prohibition against successive trials. The Clause does not allow "the State . . . to make repeated attempts to convict an individual for an alleged offense," since "[t]he constitutional prohibition against 'double jeopardy' was designed to protect an individual from being subjected to the hazards of trial and possbile conviction more than once for an alleged offense." *Green* v. *United States*, 355 U.S. 184, 187 (1957); see *Serfass* v. *United States*, 420 U.S. 377, 387-388 (1975); *United States* v. *Jorn*, 400 U.S. 470, 479 (1971). [437 U.S. at 11]

Rehearing denied.

HICKMAN and HAYS, JJ., concur.

GLAZE, J., not participating.

LAW OR CHANCERY MANDATE

STATE OF ARKANSAS. SCT.

In the Supreme Court

BE IT REMEMBERED That at a term of the Supreme Court of the State of Arkansas, begun and held at the Court Room in the City of Little Rock, on the 6th day, being the first Monday of October, A. D. 1986, amongst others were the following proceedings, to-wit:

On the 9th day of February, A. D. 1987, a day of said term

NORMA FOSTER
APPELLANT

No. CR 86-139 vs.
STATE OF ARKANSAS
APPELLEE

Appeal from Clark Circuit Court

(Circuit Court Case No. CR83-196

Petition for Rehearing is denied. See per curiam this date. Hickman and Hays, JJ., concur. Glaze, J., not participating.

Supreme Court, U.S.
FILED
MAY 26 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. *86-1734*

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

STATE OF ARKANSAS.....*PETITIONER*

VS.

NORMA FOSTER.....*RESPONDENT*

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE ARKANSAS SUPREME COURT

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STATEMENT OF THE CASE

In her first trial, Respondent was convicted of first degree murder. However, this conviction was reversed and remanded for a new trial by the Arkansas Supreme Court. *See Foster v. State,* 285 Ark. 363, 687 S.W.2d 829 (1985). Respondent's second trial resulted in a mistrial. *See Foster v. State,* 290 Ark. 495, 720 S.W.2d 712 (1986). The state obtained a conviction in Respondent's third trial, but that conviction was reversed, and the case dismissed, by the Arkansas Supreme Court. *See Foster v. State,* 290 Ark. 495, 720 S.W.2d 712 (1986), *reh. den.*, 290 Ark. 498-A, 722 S.W.2d 869 (1987). The court held that since corroboration of accomplice testimony was required by statute (Ark. Stat. Ann. § 43-2116 (repl. 1977)) and such corroboration was lacking in this case, *as a matter of Arkansas law,* the Prosecution's case was insufficient to support a conviction. The court then dismissed the charge.

The state then petitioned for a rehearing, contending that a new trial should have been ordered rather than a dismissal of the charge. The Arkansas Supreme Court held:

> Thus, it is clear to us that if the United States Supreme Court were reviewing the case before us now, it would hold, as we now hold, that if under *our* law an accused must be acquitted if the state's case is based on the uncorroborated testimony of an accomplice, then that determination on appeal prohibits retrial just as it does when acquittal occurs at the trial. The reason for reversal is not 'error' but insufficiency of the state's proof. 290 Ark. 498-A, 498-B, 722 S.W.2d 869, 871, (1987). [Emphasis added.]

The Petitioner simply disagrees with the Arkansas Supreme Court's assessment of Arkansas law. The Petitioner now seeks to relitigate a purely state issue in the United States Supreme Court. The State of Arkansas failed, in three previous trials, to obtain a conviction that would withstand appellate scrutiny. The Petitioner now seeks an opportunity for a fourth bite at the apple. This Court should deny the Petition, based on the lack of a federal question to support the grant of a Writ of Certiorari.

SUMMARY OF ARGUMENT

The Arkansas Supreme Court characterized failure to corroborate accomplice testimony pursuant to Ark. Stat. Ann. § 43-2116 as "insufficiency of proof," rather than "trial error." The Petitioner seeks to relitigate this state issue in this Court. Respondent submits that this issue is not properly cognizable by this Court through a Petition for Certiorari because no federal question has been decided by the Arkansas Supreme Court.

ARGUMENT

THIS COURT SHOULD DENY CERTIORARI BECAUSE NO FEDERAL QUESTION IS PRESENTED WHEN A STATE APPELLATE COURT REVERSES A CRIMINAL CONVICTION BECAUSE THE PROSECUTION FAILED TO CORROBORATE ITS ACCOMPLICE TESTIMONY AS REQUIRED BY STATE LAW.

Respondent has struggled in vain to see how this case, or Petitioner's argument, presents a federal question reviewable by this Court. Of course, Supreme Court Rule 17 sets forth the situations in which this Court will grant certiorari. Petitioner has not cited this rule anywhere in its Petition, so it is not clear why Petitioner believes that this Court should review this case. Petitioner may not have cited the rule because Petitioner's case does not fit within the "character of reasons" that this Court will consider.

Subsection (a) is inapplicable because it deals only with federal court decisions. Subsection (b) is inapplicable because the Arkansas Supreme Court decided no federal question, much less one in conflict with other state courts. The decision of the Arkansas Supreme Court is in accord with all state courts that have considered the issue. *See Matter of J.R.R.*, 696 S.W.2d 382 (Tex. 1985); *Caldwell v. State*, 418 So.2d 168 (Ala. 1981); *State v. Warren*, 628 P.2d 292 (Mont. 1981); *Erman v. State*, 49 Md.App. 605, 434 A.2d 1030 (1981), *cert. den.* 456 U.S. 908 (1982). No Federal Court of Appeals has decided the issue. Subsection (c) is inapplicable because, as will be explained below, the Arkansas Supreme Court simply did not decide a federal question.

The Arkansas Supreme Court merely decided a question of state law (construction of a state statute) and then applied well-established federal law to the set of facts that it found. Just because federal law was somehow involved in the ultimate disposition of the case does not mean that a federal question was decided. Presumably, under Petitioner's reasoning, every time federal law is involved in a case

a federal question is presented. This reasoning would lead to absurd results. For example, every criminal case would present a federal question, since they all apply the constitutionally mandated "reasonable doubt standard."

In Petitioner's Statement of the Case (*See* Petition, p. 4.), Petitioner attempts to state the federal question, although it does not state why this Court should hear the case. Petitioner states:

> The Arkansas Supreme Court's elevation of Foster's Fourteenth Amendment Due Process right over Arkansas' Tenth Amendment right presents the federal question that is necessary in order for this Court to exercise its statutory jurisdiction by means of Writ of Certiorari. Petition, p. 4.

However, Petitioner never again discusses the Tenth Amendment. Petitioner also does not explain why the protection of the Tenth Amendment inures only to the prosecutorial function of the state, and not to either the judicial or legislative branches of the state, so as to protect the promulgation and interpretation of Ark. Stat. Ann. § 43-2116.

While the Arkansas Supreme Court did rely on *Burks v. United States*, 437 U.S. 1 (1978) and *Greene v. Massey*, 437 U.S. 19 (1978) in making its determination to dismiss, as opposed to a new trial, that fact does not turn this case into a federal question ripe for review by this Court. The Arkansas Supreme Court only applied *Burks* and *Greene* after making an initial determination of state law. The Petitioner is actually disputing that initial determination of state law. The Petitioner concedes this in the very first paragraph of the Argument portion of its Petition, where it states:

> The exact point at which the Arkansas Supreme Court falls into error in its application of the Due Process Clause of the Fourteenth Amendment as interpreted in *Burks* and *Greene* is its failure to correctly characterize 'failure to corroborate accomplice testimony' as a 'trial error,' . . . Petition, p. 5.

Whether the Arkansas Supreme Court "correctly" determined that, as a matter of state law, failure to corroborate is, or is not, trial error is irrelevant to the present Petition. It is an issue of state law, on which that court is the final arbiter.

Petitioner attempts to bootstrap its argument into a constitutional issue by saying that the Arkansas Supreme Court held "that *Burks* and *Greene* require dismissal if the prosecution fails to corroborate its accomplice testimony." *See* Petition, p. 5. Of course, neither *Burks* nor *Greene* involved accomplice testimony. What they did involve is simply a process to be utilized in determining the applicability of the double jeopardy provision of the Constitution.

In the instant case, the Arkansas Supreme Court made its determination on the question of state law. Whether double jeopardy bars a re-trial depends on the court's decision that a failure to corroborate accomplice testimony has resulted in insufficiency of the the evidence. That is purely a matter of state law. To illustrate, if the court had determined that failure to corroborate accomplice testimony resulted in "trial error", as Petitioner contends, re-trial would not be barred by double jeopardy. The real battleground occurs in the initial determination, on the construction of state law.

This analysis was confirmed by this Court in the *Burks* decision. In *Burks*, a unanimous Court (Justice Blackmun not participating) held that "the Double Jeopardy Clause precludes a second trial *once the reviewing Court has found the evidence legally insufficient*[;] the only 'just' remedy available for that Court is the direction of a judgment of acquittal." 437 U.S. at 18. [Emphasis added.] The language emphasized above clearly dictates the result once a Court makes a determination concerning the proper characterization of the error. This is what the Arkansas Supreme Court did. Once it found the evidence legally insufficient, "the only just remedy" was to dismiss the charge.

Burks was not construed, analyzed, or interpreted; it was merely applied to the facts by Arkansas' highest Court, in much the same way as *In re Winship* is not construed, analyzed, or interpreted every

time the reasonable doubt standard is applied to a set of facts. Neither situation involves a decision as to a federal question.

While Respondent does not believe that the Arkansas Supreme Court's determination of the effect of certain evidence in its own Courts is properly reviewable by this Court, Respondent found no cases, and none were cited by Petitioner, which hold that failure to corroborate accomplice testimony, as required by statute, results in "trial error" rather than "insufficiency of proof." Of the state courts that have considered the question, all have determined that failure to corroborate accomplice testimony results in insufficiency of evidence. After making that determination, those courts proceeded to hold that a new trial would result in double jeopardy, and that *Burks* and *Greene then* require dismissal of the charge. *See Matter of J.R.R.*, 696 S.W.2d 382 (Tex. 1985); *Caldwell v. State*, 418 So.2d 168 (Ala. 1981); *State v. Warren*, 628 P.2d 292 (Mont. 1981); *Erman v. State*, 49 Md.App. 605, 434 A.2d 1030 (1981) *cert. den.* 456 U.S. 908 (1982). Other cases decided before *Burks* also indicate that failure to corroborate accomplice testimony results in insufficiency of the evidence which leads to dismissal of the charge. *See Rutledge v. State*, 507 P.2d 551 (Okla. 1973). Certainly, there is no confusion or disagreement among the states as to the effect of uncorroborated accomplice testimony.

The Petitioner appears to argue that the *Burks* rule only applies when the insufficiency of the evidence results from a failure to meet the reasonable doubt standard, rather than a burden imposed by the state legislature, such as the statute involved here. Although incorrect, this is an interesting analysis.

The reasonable doubt standard was found to have constitutional support in *In re Winship*, 397 U.S. 358 (1970). There it was stated, "[w]e explicitly hold that the Due Process Clause *protects the accused* against conviction except upon proof beyond a reasonable doubt . . ." *Id.* at 364. [Emphasis added.] Quite clearly, the reasonable doubt standard was intended to act as a shield for the accused. However, the Petitioner would invert the reasoning of *In re Winship* and use the reasonable doubt standard as a

sword. The Petitioner argues that, unless the evidence is insufficient to convict beyond a reasonable doubt, that constitutional standard may be used by the state to avoid the application of a separate constitutional guarantee.

Under Petitioner's inverted perception of constitutional law, a state could never provide any greater protection for an accused than that prescribed by the Constitution. This is not the law. Writing for the majority, Justice O'Connor stated in *California v. Ramos*, 463 U. S. 992 (1983):

> It is elementary that states are free to provide greater protections in their criminal justice system than the federal Constitution requires. We sit as judges, not as legislators . . . *Id.* at 1013-14.

The reasonable doubt standard (as with other constitutional protections) stands merely as an outer limit beyond which a state may not tread. It says that a state may not convict on less than reasonable doubt. It does not say that a state may not establish other requirements in addition to the reasonable doubt standard to convict one of its citizens.

CONCLUSION

The decision of the Arkansas Supreme Court in *Foster v. State*, 290 Ark. 495, 720 S.W.2d 712 (1986) *reh. den.*, 290 Ark. 498-A, 722 S.W.2d 869 (1987) presents no federal question that is reviewable by this Court. Respondent respectfully requests that this Court deny the Petition for Certiorari.

Respectfully submitted:

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